

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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77-1335
77-1370

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1335 and 77-1370

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT JAMES SANTA, JOSEPH DELUCA,
and MANUEL GOMEZ.

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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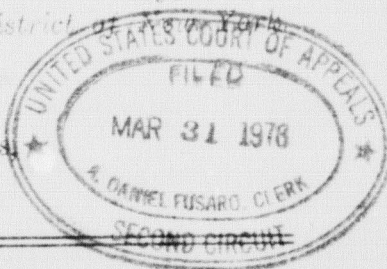


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
1. The Government's Case	4
ARGUMENT:	
POINT I—Appellant's double jeopardy claim is procedurally and substantively without foundation ..	9
POINT II—The District Court properly denied appellant's motions to suppress the stolen Schick products seized pursuant to warrant from the CBS warehouse	12
1. Sufficiency	12
2. Standing	13
3. Harmless Error	16
POINT III—The District Court properly admitted the hearsay statements of Stanley Diamond under the co-conspirator exception	17
CONCLUSION	18

TABLE OF CASES

<i>Alderman v. United States</i> , 394 U.S. 165, 172 (1969)	15
<i>Brown v. United States</i> , 411 U.S. 233 (1973)	14
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	16
<i>Grogan v. United States</i> , 394 F.2d 287 (5th Cir. 1967), cert. denied, 393 U.S. 830 (1968)	10
<i>Harrington v. United States</i> , 395 U.S. 250 (1969)	16
<i>Jones v. United States</i> , 362 U.S. 257 (1960)	14

	PAGE
<i>Sanchez v. United States</i> , 341 F.2d 225 (9th Cir. 1965)	11
<i>Simmons v. United States</i> , 390 U.S. 377 (1968) ...	14
<i>United States v. Barzie</i> , 433 F.2d 984 (2d Cir.), cert. denied, 401 U.S. 975	11
<i>United States v. Bozza</i> , 365 F.2d 206, 223 (2d Cir. 1966)	16
<i>United States v. Buonomo</i> , 441 F.2d 922 (7th Cir.), cert. denied, 404 U.S. 845 (1971)	10
<i>United States v. Friedland</i> , 391 F.2d 378, 381 (2d Cir. 1968)	11
<i>United States v. Galante</i> , 547 F.2d 733 (2d Cir. 1976)	14, 15
<i>United States v. Geaney</i> , 417 F.2d 1116 (2d Cir. 1969)	17, 18
<i>United States v. Kahan</i> , Docket No. 77-1216, Slip Op. No. 1430 (2d Cir. March 7, 1978)	3, 12, 13
<i>United States v. Kramer</i> , 289 F.2d 909 (2d Cir. 1961)	11
<i>United States v. Lopez</i> , 420 F.2d 313, 316 (2d Cir. 1969)	15
<i>United States v. Martinez</i> , 562 F.2d 633, 638 (10th Cir. 1977)	11
<i>United States v. Perez</i> , 565 F.2d 1227, 1232 (2d Cir. 1967)	10
<i>United States v. Tortorello</i> , 533 F.2d 809, 812-14 (2d Cir. 1976)	15
<i>United States v. Varelli</i> , 407 F.2d 735, 742-43 (7th Cir. 1969)	11, 12
<i>Cf. United States v. Viggiano</i> , 433 F.2d 716 (2d Cir. 1970)	13

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Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Vincent James Santa, Joseph DeLuca, and Manuel Gomez appeal from judgments of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered July 15, 1977, convicting them, after a jury trial, of knowingly and unlawfully receiving and having in their possession approximately 6,910 cartons of Schick shaving products which had been stolen from a motor truck while moving in interstate commerce, in violation of Title 18, United States Code, Section 659, and of unlawfully conspiring, together with each other and with others, to receive said stolen goods, in violation of Title 18, United States Code, Section 371.

Upon conviction, appellant Santa was sentenced to a ten-year term of imprisonment on the possession count (Count One), and a five-year term of imprisonment on the conspiracy count (Count Two), to be served concur-

rently with each other, and consecutively to a ten-year prison term previously imposed in the District of New Jersey for unrelated offenses. Appellants DeLuca and Gomez were each sentenced to a two-year term of imprisonment on the conspiracy count (Count Two), and were given suspended sentences and five-year probationary terms on the possession count (Count One). DeLuca's two-year prison term is to be served consecutively to a four-year prison term previously imposed in the District of New Jersey for an unrelated offense. Appellants Santa and DeLuca are presently incarcerated pursuant to the New Jersey judgments. Appellant Gomez is free on bail pending this appeal.

On appeal, appellants do not challenge the sufficiency of the evidence against them. Rather, they raise the following three points. *First*, appellants Santa and DeLuca contend that their convictions for the March, 1975 conspiracy to possess the stolen Schick shaving products placed them twice in jeopardy for the same offense, since they had previously been convicted of a November, 1974 conspiracy to possess a quantity of stolen Yves St. Laurent suits. *Second*, all three appellants argue that the District Court erred in denying their motions to suppress the Schick shaving products which were seized pursuant to a warrant from the CBS warehouse on March 13, 1975. *Third*, appellant DeLuca argues that the District Court erred in admitting for jury consideration as against him certain testimony as to statements by alleged co-conspirator Stanley Diamond.

Statement of Facts

The facts established at trial are uncomplicated. On March 11, 1975 at 9 p.m., a Time D.C. tractor-trailer was hijacked near Parsippany, New Jersey (111-112).¹

¹ Unless otherwise specified, parenthetical page references are to the trial transcripts.

At the time of the armed theft, the Time D.C. trailer, No. 1047, was filled with 6,910 cartons of Schick shaving products having a retail value in excess of Four Hundred Thousand (\$400,000) Dollars (911-912). The goods were being moved from West Haven, Connecticut to Anaheim, California when they were taken. The truck drivers, Carrol Bridgforth and James Lester, were removed from their truck, held at gun point in a "light green or tan late model Plymouth or Dodge" (112) for three hours, and released in the early morning hours of March 12, 1975.

Less than two days later, at 4:30 p.m., on March 13, 1975, agents of the Federal Bureau of Investigation (FBI) executed a search warrant at the CBS warehouse in Brooklyn, New York and recovered 5,072 cartons of the stolen Schick products. An additional 1,783 cartons of the goods were recovered later that day at the S & F Warehouse in Brooklyn. Chaim Kahan, Mor Werberger, and Solomon Werberger, Hassidic Jews who operated the CBS warehouse, were arrested at the time of the seizure.²

Appellants were subsequently charged with conspiracy to possess and with possession of the stolen Schick shaving products. The government's case against appellants

² Chaim Kahan, Moe Werberger, and Solomon Werberger were originally indicted with Santa and Gomez on a charge of conspiracy to possess the stolen Schick products, 75 Cr 762 (EDNY). Kahan and the Werbergers were also charged with possession in that indictment. Later, when a superseding indictment was handed up charging Santa and Gomez with possession in conjunction with DeLuca and the DeFillippos, Kahan and the Werbergers were severed and tried separately. They were convicted after a jury trial of possessing the Schick products in violation of Title 18, U.S.C., § 659. Their convictions were affirmed by this Court, *United States v. Kahan*, Docket No. 77-1216, Slip Op. No. 1430 (2d Cir. March 7, 1978).

Reference to the ethnic background of Kahan and the Werbergers is made only because of its probative value in connection with various co-conspirator statements introduced at trial.

consisted chiefly of the testimony of Paul Pollari, a government informant, and several agents of the Federal Bureau of Investigation, who jointly established that appellants had possession of the stolen Schick shaving products from at least the morning of March 12, 1975, until they delivered the goods to the CBS warehouse on the afternoon of March 13, 1975.

1. The Government's Case

Pollari testified that at approximately 7:30 p.m., on March 11, 1975, an hour and a half before the hijacking, he received a telephone call from a friend, Jimmy DeFillipo, who told him there would be an "unloading job" for him the next morning (142). Early the following day, Pollari met with Jimmy DeFillipo, his brother Patty DeFillipo, and appellant Manny Gomez, and the four of them proceeded to Tony's Gulf station in Brooklyn, where Gomez obtained three rented vehicles, two 18-20 foot straight trucks and a van. The four men then took the three rental trucks to the Zimco truck lot near McGinnis Avenue and 45th Street in Brooklyn (146). There they met appellant Santa who directed them to the middle of the truck lot where they found Time D.C. trailer No. 1047 "buried amongst a whole bunch of trailers" (147). The stolen trailer was carefully situated so that it was not visible from the street (150). Also present at Zimco when Pollari arrived was appellant DeLuca (149). Though it was a week-day morning, no one else was present on the premises.

Upon first observing Time D.C. trailer No. 1047 on the morning of March 12, 1975, Pollari noted that its doors were open and that it was full of Schick products (154). He then spent two to three hours aiding Santa, DeLuca, Gomez, and the DiFillipos in unloading the Schick products into the rental trucks (155). At some point during the unloading process, Pollari helped Santa attempt to

remove the Time D.C. signs from the sides of the trailer (165).

As the second rental truck was being loaded with the stolen goods, appellant Santa directed Gomez and Pollari to deliver the first truck load to the S&F Warehouse, Building 77 at the Brooklyn Navy Yard. He provided them with a bill of lading to be presented at the warehouse. Santa then indicated that the DiFillippos were going to the CBS warehouse (167).

Gomez and Pollari spent the afternoon of March 12th unloading Schick products at the S&F Warehouse. At 5:30 p.m., when the warehouse was closing, they were forced to leave the navy yard. They returned to the Zimco lot with a portion of the Schick products remaining on their rental truck (169). Upon their return to the Zimco lot, they found appellants Santa and DeLuca still there with the partially unloaded Time D.C. trailer. The four men, Santa, DeLuca, Gomez, and Pollari, then reloaded the rental truck with the stolen Schick products. Santa instructed Gomez to take the rental truck home for the night and to meet at the Blue Bay Diner in Queens the next morning.

On the evening of March 12, 1975, Pollari contacted agent Pecoraro of the Federal Bureau of Investigation. He also met with agents Pecoraro and Dowd at 7 p.m., on the morning of March 13, 1975, before meeting with Gomez and the DeFillippos at the Blue Bay Diner (181-182).

After the dinner meeting, Gomez and Pollari proceeded to the CBS warehouse with the rental truck full of Schick products. The DeFillippos arrived at CBS about 15 minutes later in two vans, the one which Gomez had obtained from Tony's Gulf station on March 12th, and a second U-haul van, which "Jimmy Santa said Joe

DeLuca had gotten under his own name" (176). Gomez, the DeFillippos, and Pollari spent the afternoon of March 13, 1975 unloading the stolen Schick products at the CBS warehouse (187).

As a result of their meeting with Pollari, agents Dowd and Pecoraro, together with other agents of the Federal Bureau of Investigation, set up a surveillance at the CBS warehouse on the morning of March 13th. The surveillance lasted from 10:30 a.m., until after 4:00 p.m. that afternoon. At 11:45 a.m., the agents observed appellant Gomez and Pollari arrive at CBS in a 20 foot Hertz truck (455). After backing the truck to the CBS loading dock, Gomez and Pollari were observed unloading Schick products onto the warehouse platform (454). Approximately 15 minutes later, the DeFillipo brothers were observed arriving in two separate vans. They then joined Gomez and Pollari in unloading the Hertz truck (549). The unloading of the truck and two vans continued until almost 4 p.m. (460, 549). Through use of binoculars, the agents were able to observe the identifying numbers on the Schick cartons, as well as the license numbers of the Hertz truck and rental vans in which the Schick products arrived at CBS (460, 464). Appellant Gomez and the DeFillipo brothers were positively identified by the agents who had seen them on prior occasions (547, 551-52).

After Gomez, the DeFillippos, and Pollari had completed the unloading process and departed the CBS premises, the Federal Bureau of Investigation executed a search warrant at the warehouse and seized therein 5,072 cartons of the stolen Schick shaving products. An additional 1,783 cartons of the goods were retrieved later that day at the S&F Warehouse in Brooklyn.

Pollari also testified as to events which occurred immediately after delivery of the stolen goods into the CBS warehouse on March 13th. After returning the rental vans, he and Jimmy and Patty DeFillipo went to

the area of Robert's Lounge on Lefferts Boulevard in Queens, the hangout for the hijacking crew upon which he was informing. Arriving at Tommy "Wheels" house about an hour and a half after completing the delivery at CBS, Pollari met with appellants Santa and DeLuca, and was told by Santa that "the Federal Bureau of Investigation had hit the CBS warehouse" (190). When Pollari asked Santa whether there was anything to worry about, Santa said "no, the problem was probably on the other end" (191). Santa then paid Pollari and the De-Fillippos \$700 each for their efforts. A few days later, Pollari overheard Santa in conversation in an apartment above Robert's Lounge. Santa stated "we already got 20,000 from [the Jews] and we ought to get another 20,000 because it was probably their fault" (216).

Thomas Cogar, another government informant operating within the Robert's Lounge gang, then testified as to conversations to which he was privy during the week of March 12th to March 19, 1975. During that period Cogar had been paid by the government to gather information concerning the hijacking gang which operated from the Lefferts Dress Shop and Tommy "Wheels" house (collectively known as Robert's Lounge).

Cogar testified that on the evening of March 12, 1975 he met appellant Gomez at Tommy "Wheels" house, near the Lefferts Dress Shop (675-76). Gomez asked Cogar to help him return a rented car which was due back. On the way to pick up the car, which was to be located on a certain corner in Queens, Gomez told him "they had just made a \$500,000 score" (677). Though they located the rented car, they were unable to return it that night because the car was locked and Gomez could not get into it. Cogar took down the license number of the vehicle.

Several days later, Cogar again assisted Gomez in actually returning the same car. During a conversation

while they were in route, Gomez indicated he was upset because the rented car was overdue. Gomez said that he had rented the car in his own name, and that it was used "on a razor blade job" (679).

On or about March 14, 1975, Cogar was present in the Lefferts Dress Shop during a conversation between appellant Santa and Stanley Diamond. Santa was reading a newspaper and asked Stanley Diamond "what he thought of the rabbis". As he did so, he handed Diamond the paper. Diamond responded, "Don't worry, they are tough people, they will stand up" (697). Cogar noted that Santa and Diamond were looking at an article dealing with "three people apprehended with a load of razor products stolen" (*id.*).

Later that week, Cogar was again with Santa, Diamond and Gomez at Tommy "Wheels" house. Diamond asked Santa if he was "going to get anymore money from the rabbis", and told Santa he "needed money to bring to his lawyer in Virginia" (699). Santa said he was going to see the "rabbis" the following Saturday. When Santa left the room to make a phone call, Diamond told Gomez that "the money they received was all new one hundred dollar bills with wrappers bearing the Star of David" (699).

In corroboration of Cogar and Pollari, the Government produced several document and expert witnesses. It was established that on March 10, 1975, Manuel Gomez rented a 1975 Plymouth bearing NY Plate 738 ZAO from the National Car Rental in Queens. The car was due to be returned March 12, 1975. It was returned a week later. The victim truck driver, Carroll Bridgforth, testified that a photograph of the car rented by Gomez "looked like" the car in which he was held captive the night of the hijacking (114-115).

It was further established that appellant DeLuca rented the second U-Haul van used to deliver the stolen

Schick products to the CBS warehouse on March 13, 1975 (854, 912).

Finally, the knowledge and intent of Santa and DeLuca when they possessed the stolen Schick products between March 12, 1975 and March 13, 1975 was established by evidence of their prior possession of 120 cartons of stolen Yves St. Laurent suits on or about December 2, 1974. Both Santa and DeLuca were convicted for unlawfully possessing those goods (905-906).

ARGUMENT

POINT I

Appellant's double jeopardy claim is procedurally and substantively without foundation.

Appellants Santa and DeLuca initially challenge their convictions for conspiracy to possess the stolen Schick shaving products. The constitutional predicate for their challenge is the Double Jeopardy Clause of the Fifth Amendment. Admitting that they failed to raise the issue below, appellants argue on appeal that it was "plain error" for the District Court to submit the instant conspiracy count to the jury in light of evidence that Santa and DeLuca had previously been convicted in the District of New Jersey of conspiracy to possess a quantity of stolen Yves St. Laurent suits which they possessed in December of 1974, several months before their possession of the stolen Schick products. Appellants' double jeopardy claim is both untimely and without merit.

It is now well settled, and appellants so concede, that the constitutional provision proscribing double jeopardy creates "a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be

regarded as waived." *United States v. Perez*, 565 F.2d 1227, 1232 (2d Cir. 1967); *United States v. Buonomo*, 441 F.2d 922 (7th Cir.), *cert. denied*, 404 U.S. 845 (1971); *Grogan v. United States*, 394 F.2d 287 (5th Cir. 1967), *cert. denied*, 393 U.S. 830 (1968).

Here, appellants failed to affirmatively plead their double jeopardy claim at time of trial. Nor have they proffered any excusable ground for their failure to do so. The existence of the two indictments and the facts relevant thereto were fully developed at the instant trial. Yet double jeopardy was at no time raised. Under circumstances such as these, application of the waiver rule is clearly warranted.

Appellants' failure to raise double jeopardy below is more understandable when the merits of such a claim are considered. Santa and DeLuca now contend that they have been placed twice in jeopardy for the same offense. Noting that their New Jersey conviction was for conspiracy to possess goods stolen from interstate commerce, in violation of 18 U.S.C. § 659, that several of the participants in both conspiracies were the same, and that many of the same witnesses testified at both trials, appellants conclude that "there can be little doubt that the conspiracy to possess stolen goods in New Jersey and the conspiracy to possess stolen goods in the Eastern District of New York was the same, on-going conspiracy, albeit the goods in each case were different" (Santa's Brief at p. 11).

As this Court has noted, "offenses are not the same for purposes of the double jeopardy clause merely because they arise out of the same general course of criminal conduct; they are the 'same' only when the evidence required to support a conviction upon one of the indictments would be sufficient to warrant conviction

upon the other." *United States v. Friedland*, 391 F.2d 378, 381 (2d Cir. 1968); *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961). This "same evidence" test is dispositive of double jeopardy claims regarding conspiracy as well as substantive offenses. "The mere fact that the same parties are charged with being members of two conspiracies, and that both conspiracies concerned transactions in the same items and overlapped in time, does not establish that the two conspiracies are the same". *United States v. Barzie*, 433 F.2d 984 (2d Cir.), *cert. denied*, 401 U.S. 975; *United States v. Friedland*, *supra*. See also *United States v. Martinez*, 562 F.2d 633, 638 (10th Cir. 1977); *United States v. Varelli*, 407 F.2d 735, 742-43 (7th Cir. 1969). The burden of proving that separate transactions were pursuant to the same conspiratorial agreement rests upon the defendants. *United States v. Barzie*, *supra*, 433 F.2d at 985; *United States v. Martinez*, *supra*, 562 F.2d at 637; *Sanchez v. United States*, 341 F.2d 225 (9th Cir. 1965). Here, appellants made no effort to meet that burden.

An examination of the indictments and evidence presented here indicates that appellants' burden would have been a heavy one indeed. The New Jersey indictment charged that between October, 1974 and December 2, 1974, Santa and DeLuca did conspire with Stanley Diamond, Patty and Jimmy DeFillippo, Morris Spiers, and Michael Scarano to possess 120 cartons of Yves St. Laurent suits which were stolen while moving from Paris, France to Secaucus, New Jersey.

The instant indictment charged that between March 10, 1970 and March 19, 1975, Santa and DeLuca conspired with Jimmy and Patty DeFillippo, and John Savino and Manny Gomez, to possess 6,910 cartons of Schick shaving products which were stolen while moving from West Haven, Connecticut to Anaheim, California.

On the face of the indictments, the conspiracies charged were wholly separate and independent. They overlapped neither in time nor in objective. While some participants were common to each conspiracy, proof as to each was different, involving a different agreement with different objectives. Indeed, a single conspiracy charge alleging both transactions would have failed for insufficiency. See *United States v. Varelli, supra*, 407 F.2d at 741-744. There was no evidence in the record as to the existence of "one overall conspiracy" to hijack trucks. Had the appellants offered such proof, a double jeopardy claim could have been considered by the District Court. They chose not to do so.

POINT II

The District Court properly denied appellants' motions to suppress the stolen Schick products seized pursuant to warrant from the CBS warehouse.

Appellants next contend that the District Court improperly denied their motions to suppress the Schick shaving products seized from the CBS warehouse at 4:30 p.m., on March 13, 1975. Specifically, they argue that the affidavit in support of the search warrant was insufficient, and that they, by virtue of the possession charge against them and their "interest" in the seized goods, had "automatic" and "actual" standing to contest the resulting search. The District Court found the search warrant to be constitutionally sound, and held that appellants had no standing to contest the validity of the search.

1. Sufficiency

The sufficiency of the instant warrant affidavit has already been resolved by this Court in its recent opinion affirming the convictions in *United States v. Kahan*, Docket No. 77-1216, Slip Op. No. 1430 (2d Cir. March 7,

1978). There, in a companion case, this Court affirmed Chief Judge Mishler's finding that the instant affidavit sufficiently set forth probable cause to believe that the Schick shaving products stolen March 11, 1975 were present in the CBS warehouse on March 13, 1975. The holding in *Kahan* was premised on a "commonsense" reading of the affidavit which, this Court found, permitted the issuing Magistrate to conclude that the informant "saw in the CBS warehouse the same cartons that the Time D.C. driver had reported as stolen from his truck the preceeding day." *United States v. Kahan, supra*, at —. In light of the government's post-seizure concession that the "identifying number" which the informant observed on the Schick cartons in the CBS warehouse, and upon which the affidavit was issued, turned out later to be merely a product number which "lacked ultimate specificity" vis-a-vis the stolen shipment, the Court concluded that even if the magistrate had known that to be the case the warrant "must have issued", in any event, based upon "the probable cause implicit in a successful informant's report that he had seen several thousand Schick cartons in a Bush Terminal warehouse on the day following the hijacking of 6910 cartons of such Schick cartons. Cf. *United States v. Viggiano*, 2d Cir. 1970, 433 F.2d 716". *United States v. Kahan, supra* at 6608.

In view of the fact that the issuing magistrate, the District Court, and this Court have ruled that the instant warrant issued upon "probable cause" to believe the stolen goods were in the CBS warehouse on March 13, 1975, appellants have failed to advance any arguments which would sufficiently overcome those findings or warrant application of the exclusionary rule to the fruits of the search here challenged.

2. Standing

Beyond finding the warrant affidavit sufficient, Chief Judge Mishler denied appellants' motions to suppress on the ground that appellants lacked "standing" to challenge

the CBS seizure. When asked for a pre-trial offer of proof as to their "standing", appellants relied upon the "automatic standing rule" of *Jones v. United States*, 362 U.S. 257 (1960), *Simmons v. United States*, 390 U.S. 377 (1968), and *Brown v. United States*, 411 U.S. 232 (1973). Failing that, appellants argued that they had "actual standing" by reason of their continued interest in the stolen property which they delivered to the CBS warehouse. Appellants did not allege that they were present in the CBS warehouse at the time of the search; nor did they allege any proprietary or possessory interest in the premises searched.

In denying appellants' "standing" to challenge the seizure of Schick products, Chief Judge Mishler properly ruled that the "automatic standing" rule of *Jones*, as clarified by *Brown*, applies only where possession at the time of the contested search is an essential element of the crime charged. In *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976), this Court held that *Brown* so delimited the *Jones* rule, noting "the [*Brown*] Court goes on to define such a situation as one in which the prosecution's case 'depend[s] on . . . possession of the seized evidence at the time of the contested search.' 411 U.S. at 228." Here, the government alleged and proved that appellants' possession occurred between the morning of March 12, 1975 when they unloaded the stolen trailer at the Zimco lot in Brooklyn, and 3 p.m. on March 13, 1975, when appellants gave up possession at the CBS warehouse. Indeed, the testimony as to appellants' pre-seizure possession constituted the majority of the government's case. Pollari's testimony and the FBI observations all related to appellants' possession prior to the time of the seizure. Although cartons seized from the CBS warehouse were introduced, they were introduced merely for identification purposes. The prosecution's case did not depend on such evidence. Indeed, it was wholly superfluous. Since possession at the time of the contested search and seizure was not an essential element of the charges contained in

the indictment, the "automatic standing" rule did not apply. *United States v. Brown*, *supra*, 411 U.S. 233; *United States v. Galante*, *supra*, 547 F.2d 736-738.

Appellants' claim of "actual standing" is similarly without merit. In their pre-trial offer of proof, appellants based their "actual standing" claims on the government's allegations that they sold the stolen products to the operators of the CBS warehouse, and that payment on the sale had not been completed at the time of the search. Such a residual financial interest in the seized property is alleged to have given them "constructive possession" of the stolen goods, which they argue constitutes "actual standing" for purposes of a Fourth Amendment challenge to the search of the warehouse.

In *Galante*, this Court considered and rejected a similar claim. There, in referring to Galante's standing to challenge the search of the co-conspirator's warehouse in which contraband had been stored, this Court stated:

"The mere fact that they chose to warehouse their merchandise there will not confer standing on them. One who conceals contraband or stolen goods on the premises of another does not thereby acquire an interest in those premises. *United States v. Tortorello*, 533 F.2d 809, 812-14 (2d Cir. 1976); *United States v. Sacco*, *supra*, 436 F.2d at 784. As *Brown* emphasizes, a co-conspirator or co-defendant obtains no special rights in this respect. See also, *Alderman v. United States*, 394 U.S. 165, 172 (1969)."

United States v. Galante, *supra*, 547 F.2d at 739.

The Court then went one to further discount any standing argument predicated upon a thief's "possessory interest" in stolen goods stored in the premises of another. Citing *Brown*, *supra*, *United States v. Lopez*, 420

F.2d 313, 316 (2d Cir. 1969), and *United States v. Bozza*, 365 F.2d 206, 223 (2d Cir. 1966), the *Galante* court concluded that absent presence on the premises at the time of the search, a thief has no standing to challenge the search of a warehouse in which he has no interest. The rationale of *Galante* is clearly applicable here. If a thief who stores his contraband in the premises of another has no standing to contest the search of the storage premises, one who gives up his illicit interest by selling the goods stored has even less of a standing claim, despite any outstanding "financial interest" in the stolen goods.

In view of this Court's decision in *Kahan*, and the appellants' lack of standing under *Brown* and *Galante*, the District Court's denial of appellants' suppression motions should be upheld.

3. Harmless Error

Even if the District Court had erred in denying appellants' motion to suppress the fruits of the March 13, 1975 search of the CBS warehouse, such error would have been harmless beyond a reasonable doubt. *Harrington v. United States*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967). The evidentiary value of the Schick cartons seized from the CBS warehouse was minimal.³ The overwhelming case against appellants was based instead upon the testimony of informants Paul Pollari and Thomas Cogar, as well as that of agents of the Federal Bureau of Investigation who observed Gomez and the DeFillippos delivering the Schick products into the

³ That the goods delivered to the CBS warehouse under agent observation on March 13, 1975 were part of the shipment stolen on March 11th could be established from the 1733 cartons recovered from the S&F Warehouse or from Pollari's identification of the Time D.C. Trailer—No. 1047—from which the cartons delivered to CBS had been taken.

CBS warehouse on March 13th. Indeed, the strength of the government's case against appellants would have been unaffected had the seized goods been suppressed. Any of the 1,783 cartons of stolen Schick products retrieved from the S & F warehouse could have been used for identification purposes. Since the Schick products seized at CBS were of no evidentiary value in identifying appellants, or defining their roles in the crimes charged, it must be concluded that the introduction of these goods was superfluous, and any error relating thereto harmless.

POINT III

The District Court properly admitted the hearsay statements of Stanley Diamond under the co-conspirator exception.

Appellant DeLuca lastly alleges that the District Court committed reversible error in admitting Cogar's testimony concerning conversations between Santa, Gomez, and alleged co-conspirator Stanley Diamond. Specifically, DeLuca argues that Diamond was not a co-conspirator, that he was not indicted for the crime, and that the government failed to "produce a whit of evidence tying him to the alleged conspiracy" (Brief for DeLuca at p. 28). It is alleged that DeLuca was prejudiced by the admission of Cogar's testimony as to such hearsay statements.

Here again, DeLuca's arguments have been considered and rejected by this Court's opinion in *United States v. Kahan, supra*. There, the Court, in reviewing essentially the same evidence and instructions here present, found the claim to be baseless. Holding that there was ample evidence from which the jury could conclude that scope of the conspiracy included receipt of payments for the stolen goods, and that conversations concerning such payments could be found in furtherance of that conspiracy, cf. *United States v. Geaney*, 417 F.2d 1116 (2d Cir.

1969), the *Kahan* Court ruled, on the same testimony as is present in the instant record, that the jury could find that Stanley Diamond was a co-conspirator and that his March 14th-March 19th conversations with Santa and Gomez were in furtherance of the conspiracy to possess the stolen Schick products. This Court stated:

"That Diamond himself was a co-conspirator, the jury could find, followed from his participation in the conversation to which Cogar testified; he was not in those conversations a mere observer. It was not error for the Court to rule, in ultimate substance, that the jury could find from the evidence, if they found it truthful, that the declarations about obtaining payment from the [rabbis], identified through the Diamond declarations, could be found to be in furtherance of the conspiracy. . . ."

DeLuca raises no arguments not considered by the *Kahan* opinion.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
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(Of Counsel).

Dated: Brooklyn, New York
March 28, 1978

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Paul Corcoran

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of March 19 78 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Stephen G. Murphy, 123-35 82nd Rd., Kew Gardens, N.Y. 11415

Steven Barrett, Esq. Legal Aid Society, U.S. Courthouse, Foley Sq. NYNY

Salvatore Quagliata, Esq. & Aliazzo & Kramer, Esqs. 94-03 101st Av. Ozone P
N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

30th day of March 19 78

I declare under penalty of perjury that the foregoing is true and correct.

Paul F. Corcoran
Assistant United States Attorney.

PK